

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-6176

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
P/S

FRANCISCO BANARIA, LUZUIMINDA BANARIA,
AND RIEL BANARIA,

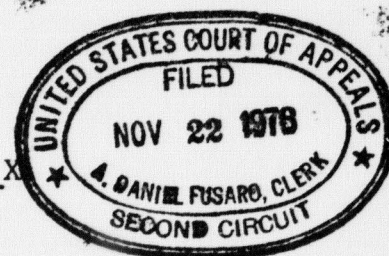
Plaintiffs-Appellants,

Docket No.
76-6176

-against-

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE,

Defendant-Appellee.



JOINT-APPENDIX
OF
APPELLANT AND APPELLEE

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7;
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UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

MATTER OF

BANARIA, Francisco T.
and his wife
BANARIA, Luzviminda
and their son
BANARIA, Riel
-Respondents-

FILE A- 21 425 016
19 320 146
21 425 017

IN DEPORTATION

PROCEEDINGS

TRANSCRIPT OF HEARING

Before: GORDON W. SACKS, Immigration Judge

Date: June 7, 1976 Place: Albany, New York

Transcribed by L. G. Friz Recorded by Cassette

Official Interpreter No One

Language English

APPEARANCES:

For the Service:

James W. Grable

Trial Attorney

Station

For the Respondent:

Barst & Mukamal, Esqs.

127 John Street

New York, New York 10038

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CONTINUED

1 HEARING HELD ON June 7, 1976:

2 IMMIGRATION JUDGE: I take it that the Order to Show Cause of Luzviminda,
3 it
4 includes within/a son, by the name of Riel. Is that correct, counsel?

5 COUNSEL: That is correct.

6 IMMIGRATION JUDGE: His number I take it is A21 425 017.

7 COUNSEL: I believe so.

8 IMMIGRATION JUDGE: Which is which?

9 COUNSEL: It is 21 425 017.

10 IMMIGRATION JUDGE: That is correct. Counsel, is there any issue with service
11 of the Order to Show Cause on any of the three respondents.

12 COUNSEL: No, there are not, your honor.

13 IMMIGRATION JUDGE: All right, EXHIBIT NO. 1 is Francisco. EXHIBIT NO. 2 is
14 Luzviminda & Son. Any issue with any of the allegations in the Order
15 to Show Cause or inclusion thereof in either case?

16 COUNSEL: Yes, your honor, there is an issue with... we admit the allegation
17 items 1, 2, and 3 but we do not on items 4 and 5. If I may further.
18 Your honor, has no jurisdiction over any relief we may have requested
19 the District Director regarding 4 or 5..... At the present time,
20 we are preparing a District Court action to review the discretionary
21 action taken by the District Director and I formally request an adjourn-
22 ment based on facts that we will file an action with the Federal Court
23 to review the allegations in the Order to Show Cause within one week

24 IMMIGRATIONS JUDGE: You have got two statements together, counsel. If you
25 wish separate them, I am willing to give you consideration to it. In
26 the first instance you tell me that they are persons who were admitted
as temporary, well insome form which you haven't admitted, but that the

1 District Director has made a denial of some kind which you are going to
2 take into court.

3 COUNSEL: That is correct.

4 IMMIGRATION JUDGE: And therefore, the allegation is incorrect. They would be
5 in the normal course, these two statements are contradictory of each
6 other. Either he has taken no proper action and therefore, or he has
7 taken no action and therefore, they are not deportable or he has allowed
8 them to become deportable improperly but generally one or the other must
9 be true.

10 COUNSEL: If I may just clarify, the second one is correct. It is that
11 we believe the District Director has taken action which has allowed
12 the respondents to become deportable, incorrectly and we believe it is
13 an abuse of..discretion. We are right now preparing District Court
14 action to review the discretion. Based on that, we feel that this
15 Order To Show Cause is brought to you erroneously and we want the
16 District Court to review it before hand.

17 IMMIGRATION JUDGE: Well, unfortunately, I cannot agree with that position.
18 I do not agree with it for this reason. If you/^{are}successful in District
19 Court then, these proceedings obviously would have to be cancelled, an
20 nullity in view of the fact that there might well be in some kind of
21 legal posture. On the other hand, if you are unsuccessful in court and
22 I allow an adjournment for an indefinite period while some court makes
23 a determination of a District matter which they have no authority over
24 my order, I would be merely inviting, continuing action to cause these
25 cases from being prosecuted expeditiously and therefore, I would not
26 entertain an adjournment for that purpose. I will entertain no adjournment

1 in this case. I will entertain solely the question of whether the
2 government cannot properly, clearly and convincingly prove their case.
3 I would then terminate, but so long as they can clearly present their
4 case now, counsel, I would not grant this merely for some District Court
5 action which has no authority over me.

6 COUNSEL: Well, we believe if the District Court action were to succeed,
7 the Order to Show Cause would be nullified automatically and we believe
8 it is an essential matter that the District Director erred in his
9 discretion and that the District Court would review. We believe that we
10 have a good case in the District Court. Instead of bringing on a
11 deportation hearing and wasting the government's time and money, the
12 District Court has 60 days, in which the government can answer to. It
13 would take such a long time. It is not a protraction here that we are
14 dealing with.

15 IMMIGRATION JUDGE: You never can tell. An answer can be placed which requires
16 argument. An answer can be placed that requires trial. An answer could
17 be replaced which requires some re-judgment.

18 COUNSEL: It is still a relief that we feel our respondents are able to obtain,

19 IMMIGRATION JUDGE: But you would get that relief, counsel. So there is no
20 doubt as long as the District Court decision was pending, action was
21 taken, they would not be removed from the United States during that
22 period.

23 COUNSEL: But if the government is so sure of its case then it could bring on
24 finish action within a matter of 90 days by some

25 IMMIGRATION JUDGE: There is no such possibility. The time within these actions
26 are completed are almost totally in the control of the individual attorney.

1 You and I both know this.

2 COUNSEL: Your honor, I don't know about the control of the individual
3 attorney. All I do know is that we are preparing a District Court
4 action which has the essence of this Order to Show Cause in question,
5 IMMIGRATION JUDGE: I understand. If you are successful the Order to Show
6 Cause will then die. If you are unsuccessful, they will have to be
7 prepared to either, well, whatever occurs in this proceeding, they will
8 have to be prepared to accept that decision, whatever it is or to appeal
9 it.

10 COUNSEL: Then I repeat formally, my request for my motion for an adjournment
11 based on the fact that the District Court action which is to be filed
12 in a very short time.

13 IMMIGRATION JUDGE: I formally deny it unless I find some new evidence in the
14 proceeding which would have me reconsider.

15 COUNSEL: All right.

16 IMMIGRATION JUDGE: All right, there is a denial. Does the government wish
17 to proceed.

18 MR. GRABLE: Yes, your honor, we introduce I-94 which pertains to Luzviminda
19 Banaria, who is the H-1 in this case.

20 IMMIGRATION JUDGE: Counsel, any objection.

21 MR. GRABLE: Also a I-94 issued to Francisco Banaria, who is the H-4.

22 COUNSEL: I object to the fact that the I-94 is in that action which is
23 requested of the service and did not request any action on the back.

24 MR. GRABLE: An H-4 which pertains to Riel Banaria.

25 IMMIGRATION JUDGE: You mean there is action other than that which is already
26 reflected... on the back. Is that what you are saying, counsel?

1 COUNSEL: No, your honor.
2 Form I-129B/
3 IMMIGRATION JUDGE: And a letter from St. Clare's Hospital of March 4th,
4 is EXHIBIT NO. 4.
5 A copy of a letter from Acting Officer in Charge, Albany to Counsel,
6 Any objection to receipt, counsel?
7 COUNSEL: No, your honor.
8 IMMIGRATION JUDGE: It is EXHIBIT NO. 5. I take it from the evidence now
9 submitted that it is clear from Exhibits 3, 4, 5 that although she has
10 an approved visa petition that the government is not prepared to re-
11 instate when the woman requires a new visa with which to enter the
12 United States again, if she hadn't overstayed her time as charged in
13 the order to Show Cause. I take it in view of the fact that there is
14 no issue taken by the Counsel or anyone else that if the primary
15 recipient is classed as being over her time, it is automatic that the
16 spouse and child thereof who are all H-4's would additionally be
17 considered over their time.
18 COUNSEL: Your honor, may I question the respondent on that matter?
19 IMMIGRATION JUDGE: On what?
20 COUNSEL: On the question of whether she has overstayed her time and why.
21 IMMIGRATION JUDGE: Well, I couldn't/^{deny}the right to examine the client. Counsel,
22 what effect would it have in my case.
23 COUNSEL: Well, the fact is that there were extenuating circumstances.
24 IMMIGRATION JUDGE: I understand.
25 COUNSEL: Now the client did have a child right before the time for extension
26 became due but she was working as a registered nurse
the United States and as she overlooked this matter while having a child

1 IMMIGRATION JUDGE: I understand. I fully agree that you may have argument
2 as to why the Acting Officer in Charge's letter, a denial of extension
3 is in some form attackable but it is clear that so long as there is any
4 reasonable basis upon which to make such a determination I cannot in
5 anyway be involved in the matter because it is without my purview. I have
6 no authority. Even if there were no reasonable grounds to deny so long
7 as the applicant was beyond her time in the United States, before the
8 application was submitted, that alone was more than sufficient
9 whatever, the grounds of excuse might be, for me to say that they acted
10 after due consideration, which is the only thing I can determine.

11 COUNSEL: In that case, your honor, you do say that it can be attackable. I
12 hereby make another request for you to reconsider a motion for adjourn-
13 ment based on the fact that we do have a chance for attacking it
14 in the Federal Court.

15 IMMIGRATION JUDGE: I didn't say that to you without having knowledge of it
16 counsel. I never made a statement that is attackable or anything is
17 attackable.

18 COUNSEL: Right.

19 IMMIGRATION JUDGE: Even if there was good cause to believe that you might be
20 successful, counsel, it is still not reason to adjourn this matter.

21 COUNSEL: I believe that it is essential to this matter. It is a crux of the
22 whole question, the issuance of the Order to Show Cause.

23 IMMIGRATION JUDGE: No, counsel, the crux of the issue here is whether they
24 were in actual status for any time, even if it is only
25 momentarily so long as that did occur that is the crux of this hearing.
26 The crux of whether this hearing could become a nullity based upon their

1 then being reconsidered and granted the status is a different matter
2 but a nullity can be created almost in any proceeding under certain
3 circumstances, even the unfortunate circumstance of death, So I will
4 not grant adjournment for that purpose. In view of the fact I find
5 them deportable, I take it.-- We have the asylum matter. Are you
6 prepared to defend them first with that? Does the government wish to
7 submit evidence on that matter?
8 MR. GRABLE: Yes, your honor.
9 IMMIGRATION JUDGE: Any objection to the I-589 and the photostatic copy of
10 an affidavit of ?
11 COUNSEL: No, your honor.
12 IMMIGRATION JUDGE: It is EXHIBIT NO. 6.
13 There is in addition a letter to the Office of Refuge and Migration
14 Affairs. Any objection to its receipt?
15 COUNSEL: Is there an answer from the office of Migration Affairs?
16 IMMIGRATION JUDGE: No, this is one of the form letters to which the 30 day
17 period has to elapse.
18 COUNSEL: I will since the government has no answer anyway,
19 IMMIGRATION JUDGE: Well, that is interesting. There is no date upon this
20 letter to tell me when the 30 days is up.
21 MR. GRABLE: Yes, I noticed that.
22 IMMIGRATION JUDGE: Is there some way we can have that clarified?
23 MR. GRABLE: We can have it clarified by the Immigration Examiner,
24 IMMIGRATION JUDGE: Well, do you either want to produce him or?
25 MR. GRABLE: Yes, we will.
26 OFF THE RECORD.

1 COUNSEL: I want to ask the respondent a question.
2 COUNSEL TO FEMALE RESPONDENT:
3 Q The record states that you entered the United States on May 29, 1972 as
4 a nonimmigrant H-1 nurse working in the United States as a professional
5 nurse.
6 A Yes.
7 Q The record also shows that on August of 1972, you applied for a 3rd.
8 preference?
9 A Yes.
10 Q Did you indicate to the Immigration Service that you were in the United
11 States when you applied for that 3rd.preference?
12 A Yes.
13 Q You gave them your address? Did you tell them you were an H-1, in the
14 United States?
15 A Yes.
16 Q You got the 3rd. preference approval of it on the same profession that
17 you got your H-1 visa. Is that correct?
18 A Yes.
19 Q Then, after you had approval, you applied for an extension of your H-1
20 Is that correct? Did you give the same name and address?
21 A Yes.
22 Q Did the Immigration Service know that you had a 3rd. preference approval?
23 A I think so because I applied to the same office.
24 Q Did you put down on the application that you had a 3rd. preference?
25 A Yes, sir, I did.
26 Q On the application, it said that you wanted to stay here for another year

1 as a nurse. Right?

2 A Yes.

3 Q Did the Immigration Service approve this application even though they

4 knew you had a 3rd. preference?

5 A Yes, sir, they did.

6 COUNSEL: That is all, your honor.

7 MR. GRABLE: I have one other question.

8 MR. GRABLE TO FEMALE RESPONDENT:

9 Q When you came into the United States, were you destined to work as

10 a registered nurse?

11 A Saratoga.

12 Q Did you ever file an affidavit for permission to transfer from one

13 hospital to another?

14 A I came over and talked to one of the officers and told them that I

15 wanted to leave Saratoga.

16 Q Did you file a petition with the Immigration Service to leave Saratoga

17 and accept an employment at any other hospital?

18 A I did not have to.

19 Q Why didn't you? You said you talked to someone here about it, What

20 did they advise you?

21 A They said apply to St. Clare's Hospital, if they can accept me. I

22 applied to St. Clare's Hospital and they accepted me.

23 Q Did St. Clare's ever file any petition for you to accept an employment

24 at their hospital?

25 A They gave me a letter of employment.

26 Q So in fact, the day that you were apprehended, were you not in fact

-31-

1 supposed to work in Saratoga instead of St. Clare's?

2 A No.

3 Q Did you have permission from the Immigration Service to accept employment

4 at St. Clare's at any time?

5 A I did not have to.

6 Q Well, that is not the question. The question is do you have permission

7 from the Immigration Service today to accept employment at St. Clare's

8 Hospital?

9 A Yes, because I bring some letters today from St. Clare's,

10 Q Now, when you filed for your immigrant visa so that you could come over

11 to the United States and remain here permanently, where did you indicate

12 that you wanted this visa sent to?

13 A My address was at Saratoga.

14 Q I figured that but where did you indicate that you wanted the visa sent

15 to? Did you not indicate that you wanted it sent to Manila so you could

16 go over there and pick it up?

17 A I don't know. Did they have a form made up of...

18 Q When you made your application, did you indicate that you would pick up

19 your visa in the United States or you would pick up the visa somewhere

20 foreign, an American Embassy, or an American Consulate? Did you indicate

21 where you wanted to pick up your immigrant visa? Did you not indicate

22 that you wanted to go back to the Philippines and pick up your visa?

23 A Right.

24 Q Is it not true that if you went back to the Philippines today and your

25 visa was ready today, that you would go to the Philippines and pick it up?

26 A Yes.

1 MR. GRABLE TO MALE RESPONDENT:
2 Q Would you follow your wife? Would you go to the Philippines with your
3 wife to pick up the Immigrant visa in the Philippines?
4 A Oh, yes.
5 MR. GRABLE: The government rests, your honor.
6 COUNSEL TO BOTH RESPONDENTS:
7 Q You just said you would go back to the Philippines to pick up your visas?
8 A No, I don't think so. (female)
9 A No, not over there. (male)
10 Q
11 A That is illegal. (By Both)
12 Q When you applied for your extension as an H-1, let us goes back, let us
13 say an even 2 years, did you give in a letter that you worked for St.
14 Clare's Hospital?
15 A Yes.
16 Q They approved the extension?
17 A Yes, I gave a letter.
18 IMMIGRATION JUDGE: Anything more in defense.
19 COUNSEL: No, your honor.
20 IMMIGRATION JUDGE TO MALE RESPONDENT:
21 Q In your testimony, I think you stated that you had got some information
22 from the Philippines about 2 months ago by some people who were visiting.
23 Are those people here?
24 A Yes, sir.
25 Q They are here in the United States?
26 A Yes, sir.

1 A No, sir.
2 Q When was the last time you worked in the United States?
3 A March, sir.
4 Q March of this year?
5 A Yes, sir.
6 Q Is that the job that the government referred to that you had lost
7 because they found out what you were in the United States or is that a
8 different job?
9 A No, this is the job, the same job.
10 IMMIGRATION JUDGE: Anything more, gentlemen?
11 COUNSEL: No, your honor.
12 MR. GRABLE: No, your honor.
13 IMMIGRATION JUDGE: What is your designation for the place of deportation?
14 COUNSEL: We do not wish to make any such designation as to the place of
15 deportation.
16 IMMIGRATION JUDGE: I request the government's designation for the place of
17 deportation?
18 MR. GRABLE: I designate the Philippines for the place of deportation in
19 both cases.
20 IMMIGRATION JUDGE: This is the oral decision of the Immigration Judge.
21 (At this point in the proceedings, the Immigration Judge orally stated
22 his decision which consists of a discussion of the evidence, findings of
23 fact, a conclusion of law, and an order which are transcribed separately
24 and made a part hereof.)
25 IMMIGRATION JUDGE: Counsel, your position on appeal?
26 COUNSEL: I reserve my right to appeal.

1 IMMIGRATION JUDGE: Very well, you have 10 days, that is June 17th. for an
2 appeal to be submitted.

3 THE HEARING IS CLOSED.-----
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I HEREBY CERTIFY THAT TO THE BEST OF MY
KNOWLEDGE AND BELIEF THE FOREGOING PAGES
NUMBERED 1 TO 36 ARE A COMPLETE AND ACCURATE
TRANSCRIPT OF THE ABOVE DESCRIBED PROCEEDING.
(Some phrases were inaudible.)

Lucille H. Fris

Transcriber

. October 8, 1976

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File Nos.: A21 425 016
A19 320 146
A21 425 017

June 7, 1976

In the Matter of

BANARIA, Francisco T.
and his wife
BANARIA, Luzviminda
and their son
BANARIA, Riel
-Respondents-

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act Section 241(a)(2)
Temporary nonimmigrants - remained longer.

APPLICATION: Withholding of Deportation 243(h) - In the alternative
Voluntary departure.

IN BEHALF OF RESPONDENTS:

Barst & Mukamal, Esqs.
127 John Street
New York, New York 10038

IN BEHALF OF SERVICE:

James W. Grable
Trial Attorney
Buffalo, New York

ORAL DECISION OF IMMIGRATION JUDGE

The respondents are husband and wife. A son is not present at the proceeding but is included in the wife's Order to Show Cause. The respondents are citizens of the Philippines who now have a United States citizen child. There is no issue taken with their having entered the United States in May of 1972 now with the fact that they entered in the capacity of the charges in the Orders to Show Cause. The issue has been taken, however, with whether they are presently deportable as charged. The government has submitted evidence with respect that the last extension,

is a valid extension of their stay in the United States, was to April 30, 1975, as charged. The form of argument is to the effect that they were improperly denied return to valid status upon an application submitted approximately one year after their extension had elapsed. They make claim to the fact that there was sufficient ground on which the District Director should have granted them return to valid status to a temporary form and a determination not to so grant has been exhibited in this cause, is dated May 4, 1976. I do not take a position on whether the District Director's decision is clearly what I individually, if I were adjudicating it initially, have taken. However, I do find that the District Director has given consideration to their request and his determination is not reviewable in this proceeding. I therefore, find that the government has properly proven by clear and unequivocal and convincing evidence that the respondents are deportable as charged in the Orders to Show Cause.

A request has been made for Withholding of Deportation under Section 243(h) of the Immigration and Nationality Act from deportation to the Philippines and to that application for separate withholdings have been accepted in the form of the I-589. Withholding requests are made principally on the claim of political and religious persecution. Other than the very brief statement made, both on an affidavit submitted as part of the evidence and on those official Immigration forms, the total evidence before me is the testimony of the respondents. I take it as somewhat unusual to express a claim that although the President of the

government is a Catholic, just as the respondents are, that there is a claim differentiation between the form of religious availability that existed prior to and since; the present President, has restricted the actions of the people of that country. It is my opinion that this claim whether there is or there is not some truth to the statement, that the ability to practice your religion is sufficient to place you without purview of persecution and, therefore, I find as to that issue there is no proof sufficient to sustain your request. As to the question of political persecution, the sole evidence as to the activities in the Philippines prior to his coming to the United States, is that the male respondent partook of some demonstrations against the government generally while he was a student at the University in a field of political science. There is, however, no showing and he did admit that he did at one time vote for Mr. Marcos as President and that there was no persecution to he or his colleagues at the time it occurred, nor at anytime while he was in the Philippines. He made statements to the effect that he knows that some persecution existed since then and one person he named he believes is dead although there has been no explanation of how that occurred whether by accident, by injury, by illness or by political activity. The female respondent's claim is based almost exclusively on a fear for which there is no specific foundation laid here. Each of these respondents have families in the Philippines who have not been harassed and have not in anyway been subject to any persecution, that they claim these fears solely to remain with their family

which is in the United States, particularly of the wife, it would seem that she is concerned principally with being able to live and prosper in the United States rather than her fear of political activity in the Philippines, possibly economic, but not political. They both tell me that they do not fear returning to the Philippines, at least momentarily, if an opportunity arose for them to obtain the necessary documentation with which to return to the United States as permanents. I do not believe that Section 243(h) was conceived or construed for the purpose of allowing an individual to determine that this country, after entry rather than before entry, was the place of asylum they wished to attain. This is also true by my reading of the protocol. The fact they are capable of returning to the Philippines and possibly arranging for a life in some third country during that interim period and not be persecuted is more than sufficient. I find that I cannot sustain their version of a preponderance of the evidence that they would reasonably be persecuted if they returned to the Philippines. I, therefore, deny their applications.

In the alternative, the respondents have requested voluntary departure from the United States and although there is no definite statement that they are prepared to leave or that they have sufficient funds or that they are truly capable of obtaining them, the wife is presently employed and I take it, therefore, that they could clearly qualify and I should so grant.

There seems to be no basis upon which any other form of relief can be granted in this proceeding. There is, therefore, the question of whether it is proper to consider for voluntary departure, the length

of time that is necessary to prosecute a possible claim in the District Court of the right to reinstate after a couple years of illegal status in the United States. It is clear that such prosecution before a District Court would entail a minimum of 60 or 90 days and it is further noted that the determination of that matter might then be additionally appealed. However, I will consider it proper to grant an opportunity to ask for determination by the District Court and I consider any additional time for appeal purposes to lie solely with the discretion of the District Director. I will, therefore, enter the following order:

ORDER: IT IS ORDERED that in lieu of an order of deportation that the respondents be granted voluntary departure without expense to the government on or before September 7, 1976, or any extension beyond that date as is granted by the District Director and under such conditions that the District Director shall direct.

IT IS FURTHER ORDERED that if the respondents fail to depart as required, the privilege of voluntary departure shall be withdrawn without further notice or proceeding and the following order shall thereupon become immediately effective: the respondents shall be deported from the United States to the Philippines on the charges contained in the respective Order to Show Cause.

IT IS FURTHER ORDERED that the application for Withholding of Deportation to the Philippines under Section 243(h) of the Immigration and Nationality Act be denied.


Gordon W. Sacks, Immigration Judge

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

X

FRANCISCO BANARIA, LUZUIMINDA BANARIA,
and RIEL BANARIA,

Plaintiffs,

-against-

perdict her
BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE,

Defendant.

X

76 cv. 352
Civil Action
No. 76 357

COMPLAINT

TO THE HONORABLE JUDGES
OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK:

Plaintiffs by their attorneys, Barst & Mukamal, for their
complaint herein, respectfully show to this Court and allege
that:

AS AND FOR A FIRST CLAIM

1. This is an action for declaratory relief pursuant to
28 U.S.C. 2201, review pursuant to 5 U.S.C. 704 et seq., and
preliminary injunctive relief, pursuant to Rule 65(a) of the
Federal Rules of Civil Procedure.

2. Your plaintiffs are aliens, nationals of the Philippines,
and reside within this District at 3312 Woodlawn Avenue,
Schenectady, New York.

3. Defendant, BENEDICT FERRO, is the District Director of the Immigration and Naturalization Service with offices located at the United States Post Office Building, Broadway, Albany, New York.

4. That plaintiff, LUZUIMINDA BANARIA, entered the United States on an 'H' visa as a registered nurse on or about May 29, 1972 and that she was authorized to remain in the United States until May 30, 1975.

5. That on or about March 21, 1975, Mrs. BANARIA gave birth to a United States citizen child and as a result of circumstances attending the birth of this child neglected to file an application for an extension of her authority to remain in the United States.

6. That subsequently, Mrs. BANARIA applied to the Immigration and Naturalization Service for a reinstatement of her 'H' status and an extension of same. This application was denied by defendant in an arbitrary and capricious manner which disregarded the facts surrounding Mrs. BANARIA's technically improper failure to make a timely filing of an application for the aforementioned extension of her 'H' visa.

The result of defendant's denial of Mrs. BANARIA's application for reinstatement of her 'H' status was an order of deportation with a provision for voluntary departure.

AS AND FOR A SECOND CLAIM

7. Plaintiffs repeat and reallege each and every allegation of this complaint contained in paragraphs "1" through "6" inclusive, with the same force and effect as hereinafter set forth at length.

8. That plaintiff, LUZUIMINDA B. BANARIA, is the beneficiary of an approved third preference visa petition which was filed, pursuant to 8 U.S.C. 1153(a)(3), on August 2, 1972.

9. That the aforementioned visa petition was granted Mrs. BANARIA on the basis of her professional occupation, that of a registered nurse, under file number A19 320 146.

That plaintiff, FRANCISCO BANARIA, whose immigration status is dependent upon his wife's approved third preference visa petition, possesses the file number A21 425 016.

That plaintiff, RIEL BANARIA, is the son of the aforementioned plaintiffs and possesses the file number A21 425 017, and his immigration status is dependent upon that of his mother, LUZUIMINDA BANARIA.

That on or about May 12, 1976 plaintiffs made application to defendant for extended voluntary departure on the basis of Mrs. BANARIA's approved third preference visa petition and said application for extended voluntary departure which would permit

the BANARIAS to remain in the United States until immigrant visa numbers became available for their use, was denied by defendant on or about June 1, 1976.

11. That said denial was arbitrary and in excess of statutory authority in that on July 17, 1972 the Immigration and Naturalization Service (hereinafter the 'Service') ordered the revocation of Section 242.10(a)(6)(ii) of the Service's Operations and Instructions (hereinafter 'O & I') which provided for a grant of extended voluntary departure for beneficiaries of approved third preference visa petitions. Said order revoking O & I 242.10(a)(6)(ii) was to be effective July 31, 1972, or two weeks after said order of revocation was made.

12. That Section 242.10(a)(6)(ii) is a rule within the terms of 5 U.S.C. 551 et seq. and, as such, falls within the statutory mandate of 5 U.S.C. 553(b) which requires notice and publication to make valid changes in administrative rules. Though never formally published in the Federal Register, this rule was relied upon generally by those in and out of government.

13. That the failure of the Service to give notice and publish the revocation of the rule embodied in O & I 242.10(a)(6)(ii) renders such revocation void.

14. That prior to the unlawful revocation of this rule extended voluntary departure was automatically granted to

beneficiaries of third preference visa petitions and a letter informing the beneficiaries of extended voluntary departure accompanied the notice of approval of such third preference visa petitions.

15. That change of policy of this nature requires a sound basis, notice, an opportunity to be heard and publication in the Federal Register or in the alternative, a sound basis, notice and a published finding of good cause to avoid delay in effective date. No attempt was made to comply with the law.

16. The result, which denies extended voluntary departure to third preference beneficiaries, violates due process of law in that it is the product of secret "law" contrary to 5 U.S.C. 552 and 5 U.S.C. 553 and the Fifth Amendment of the Constitution of the United States.

17. That defendant will invoke warrants of deportation against plaintiffs on or about September 7, 1976 and is thus preparing to deport plaintiffs from the United States with the net effect of depriving plaintiffs of their right to bring the instant action before this Court.

WHEREFORE, it is prayed that:

(a) an order issue granting a preliminary injunction, pursuant to Rule 65(a) of the Federal Rules of Civil Procedure, enjoining defendant from deporting plaintiffs from the United States prior to a final determination on the merits of this action;

(b) a judgement be entered for plaintiffs declaring that defendant's denial of LUZUIMINDA BANARIA's application for reinstatement of her 'H' status was arbitrary, capricious and contrary to law and that such reinstatement to status and extension be ordered; and

(c) a judgment be entered declaring defendant's revocation of Operations and Instructions Section 242.10 (a) (6) (11) void and of no effect and that plaintiffs be granted extended voluntary departure pursuant to the terms of this unlawfully revoked rule.

Dated: New York, New York

August 30, 1976

Respectfully submitted:

STEVEN S. MUKAMAL, ESQ.
Attorney for Plaintiff
Barst & Mukamal
127 John Street
New York, New York 10038

Tel: 212/952-0700

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCISCO BANARIA, LUZUIMINDA
BANARIA, and RIEL BANARIA,

Plaintiffs,

ANSWER

-against-

Civil No. 76-CV-352

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION
SERVICE,

Defendant.

The defendant, BENEDICT FERRO, District Director, Immigration and Naturalization Service, hereinafter, the District Director, by his attorney, James M. Sullivan, Jr., United States Attorney for the Northern District of New York, as and for his answer to the complaint herein, respectfully:

FIRST: ADMITS the truth of the averments contained in paragraphs 2, 3, and 8 of the complaint.

SECOND: DENIES the truth of the averments contained in paragraphs 1, 12, 13, 15, and 16 of the complaint.

THIRD: DENIES the truth of the averments contained

in paragraphs 4, 5, 6, 9, 11, 14, and 17 of the complaint, except

(a) with respect to paragraph 4, admits that on or about May 29, 1972, the plaintiff, LUZUIMINDA BANARIA, entered the United States on an "H" visa as a nurse, and that said plaintiff was authorized by the Immigration and Naturalization Service to remain in the United States until April 30, 1975,

(b) with respect to paragraph 5, admits that on or about March 21, 1975, the plaintiff, LUZUIMINDA BANARIA, gave birth to a United States citizen child, that the plaintiffs failed and neglected to file with the Service

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a request for an extension of their authority to remain in the United States after April 30, 1975, when that authorization expired, and that this failure and neglect was determined not to be excusable by a delegate of the defendant, District Director, on or about May 4, 1976,

(c) with respect to paragraph 6, ^{admits} that on or about April 6, 1976, the plaintiffs, by their attorneys, submitted an application to the Immigration and Naturalization Service, for reinstatement of their lapsed "H" visa status nunc pro tunc, that this application was denied by a delegate of the defendant, District Director, on or about May 4, 1976, and that on or about June 7, 1976, the plaintiffs were ordered deported to the Philippines, but were granted voluntary departure until September 7, 1976, by a Special Inquiry Officer of the Immigration and Naturalization Service,

(d) with respect to paragraph 9, admits that on or about July 16, 1973, the petition of the plaintiff, LUZUIMINDA BANARIA, who possesses alien file no. A19 320 146, for a third preference, under 8 U.S.C. §1153(a)(3), was approved by a delegate of the District Director, on account of her occupation as a nurse, that plaintiff, FRANCISCO BANARIA, whose classification depends upon the approved third preference petition of plaintiff, LUZUIMINDA BANARIA, possesses alien file no. A21 425 016, that plaintiff, RIEL BANARIA, the alien son of the aforementioned plaintiffs, whose classification depends upon the approved third preference petition of plaintiff, LUZUIMINDA BANARIA, possesses alien file no. A21 425 017, that the plaintiffs, by their attorneys, on or about May 12, 1976, made application to the defendant, District Director, for an indefinite period of voluntary departure which was denied by the defendant on or about June 1, 1976,

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(e) with respect to paragraph 11, admits that effective July 31, 1972, former Section 242.10(a)(6) of the Operations and Instruction Manual of the Immigration and Naturalization Service, which had authorized extended voluntary departures for aliens holding approved third preference petitions, was terminated by the Service except for aliens already in such an extended voluntary departure status,

(f) with respect to paragraph 14, admits that prior to the revocation of this former Section of the Manual, aliens possessing an approved third preference petition were granted an extended voluntary departure by the Service, and

(g) with respect to paragraph 17, admits that Warrants of Deportation of the Plaintiffs were duly issued by a delegate of the Attorney General of the United States on or about September 14, 1976, the execution of which has

been stayed by a Temporary Restraining Order of the United States District Court entered on September 20, 1976.

FOURTH: REPEATS his respective responses to the averments repeated and realleged in paragraph 7 of the complaint.

FIFTH: STATES that the defendant, District Director, as part of his answer to the complaint herein, files herewith, and incorporates in his responsive pleadings, a certified transcript of the administrative proceedings conducted before the Special Inquiry Officer of the Immigration and Naturalization Service pursuant to 8 U.S.C. §1252(b).

AS AND FOR SIX SEPARATE AND DISTINCT
AFFIRMATIVE DEFENSES TO THE COMPLAINT,
THE DEFENDANT, DISTRICT DIRECTOR, BY
HIS ATTORNEY, AVERS:

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FIRST DEFENSE

SIXTH: That the plaintiffs have failed to exhaust all available administrative remedies and are thus precluded from obtaining judicial review of the actions of the defendant.

SECOND DEFENSE

SEVENTH: That the U.S. District Court lacks jurisdiction over the subject matter of this civil action.

THIRD DEFENSE

EIGHTH: That the actions of the defendant, District Director, and his subordinates, of which the plaintiffs presently complain, were committed to the discretion of the Attorney General of the United States, the defendant, District Director, or their delegates by law, and that these actions were at all times reasonable and in accordance with the applicable law.

FOURTH DEFENSE

NINTH: That the former policy of the Immigration and Naturalization Service, concerning the Service's granting of extended voluntary departures to aliens holding approved third preference petitions prior to July 31, 1972, was within the "general statement of policy" exception of the Administrative Procedure Act, 5 U.S.C. §553(b)(A), and was not subject to the public notice requirements and the judicial review provisions of that Act.

FIFTH DEFENSE

TENTH: That the complaint fails to state any claims upon which relief can be granted.

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SIXTH DEFENSE

ELEVENTH: That the complaint does not present a justiciable case or controversy.

WHEREFORE, defendant demands judgment against the plaintiffs, dismissing their complaint with prejudice and with all allowable costs and disbursements, and granting such other and further relief as the District Court deems just and proper.

Dated: October 19, 1976
Albany, New York

JAMES M. SULLIVAN, JR.
U.S. Attorney
Attorney for Defendant
U.S. Post Office & Courthouse
Albany, New York 12207

BY: *Richard K. Hughes*

RICHARD K. HUGHES
ASSISTANT U.S. ATTORNEY

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCISCO BANARIA,
LUZUMINDA BANARIA,
and
RIEL BANARIA,

Plaintiffs,

-against-

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION
SERVICE,

Defendant.

76 Civ. 352

ORDER TO
SHOW CAUSE
TO STAY A
DEPORTATION
WITH A STAY

Upon the annexed motion and affidavit of Steven S. Mukamal,
Esq., it is

ORDERED that the defendant or his attorney show cause before
a judge of this Court at the United States Courthouse, Albany,
New York, in room ^{the main court} at 2 P. M. on September 23rd,
1976 or as soon thereafter as counsel can be heard, why an order
should not be made directing that the imminent deportation of
FRANCISCO BANARIA, LUZUMINDA BANARIA and RIEL BANARIA be
stayed pending a final determination of this action pursuant to
a complaint filed with this Court and it is

ORDERED, that all proceedings to effectuate the deportation
of FRANCISCO BANARIA, LUZUMINDA BANARIA and RIEL BANARIA be

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stayed from this date and until a final determination on this order to show cause and the entry of an order thereon, and

IT IS FURTHER ORDERED that service of a copy of this order and of the papers upon which the same is granted, on the said defendant and upon the United States Attorney, on or before

2 M., Sept 21, 1976, shall be sufficient service of this order. In Chambers September 10, 1976 AVSA
Richard K. Hughes, State Atty. authorized to accept
service as U.S. Atty. for District of Columbia

Dated: Albany, New York
20th September 1976

2:30 PM

James T. Foley
UNITED STATES DISTRICT JUDGE

To Chambers
in Albany authorized to accept
service as U.S. Atty. for Defendant

File

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCISCO PANARIA,
LUZUIMINDA PANARIA,
and
RIEL PANARIA,

Plaintiffs,

-against-

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION
SERVICE,

Defendant.

76 Civ 352

MOTION FOR
PRELIMINARY
INJUNCTION

Plaintiffs move this Court for a preliminary injunction enjoining the defendant, Benedict Ferro, his agents, employees and all other persons in active concert and participation with him, pending the final hearing and determination of this action, from effectuating the deportation of the plaintiffs from the United States of America, on the grounds that:

1) Unless restrained by this Court, defendant will deport the plaintiffs from the United States within an extremely short period of time and in any event prior to a final hearing and determination of this action with the effect of depriving plaintiffs of their constitutional right to access to the Courts of the United States.

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2) Such action by defendant will result in irreparable injury, loss and damage to the plaintiffs as more particularly appears in

- a) the complaint on file with this Court;
- b) the affidavit of plaintiffs' attorney, Steven S. Mukamal;
- c) the affidavits of Francisco Banaria and Luzuiminda Banaria, attached hereto; and

3) That the issuance of a preliminary injunction in this matter will not cause undue inconvenience or loss to defendant but will prevent irreparable injury to plaintiffs.

Dated: New York, New York
September 17, 1976

Steven S. Mukamal
STEVEN S. MUKAMAL
Attorney for Plaintiffs

Barst & Mukamal
127 John Street
New York, New York 10038
212/952-0700

To:
United States Attorney
Northern District of New York
Albany, New York

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCISCO BANARIA,
LUZUIMINDA BANARIA,
and
RIEL BANARIA,

Plaintiff,

76 Civ. 352

AFFIDAVIT

-against-

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION
SERVICE,

Defendant.

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

STEVEN S. MUKAMAL, being duly sworn, deposes and says:

1. That I am a partner in the firm of Barst & Mukamal, attorneys for plaintiffs in the above-captioned action and that I am in charge of plaintiffs' cause.
2. That I make this affidavit in support of plaintiffs' motion for a preliminary injunction which was being brought in order to prevent the irreparable harm and injury that will result should defendant be permitted to effectuate the deportation of plaintiffs from the United States.
3. That this office has been informed telephonically by

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defendant's office that warrants of deportation have been issued against plaintiffs and that defendant has denied plaintiffs' application for a stay of deportation pending a final determination in this action.

4. As appears more fully in the affidavit of Philip J. Kleiner, Esq., attached hereto, plaintiffs have a substantial claim against the defendant insofar as defendant's denial of Luzuiminda Banaria's application for reinstatement of her H-1 status was arbitrary and an abuse of discretion.

5. That plaintiffs have exhausted their administrative remedy in this matter.

6. That no previous application for the relief sought herein has been made.

Steven S. Mukamal
STEVEN S. MUKAMAL

Sworn to before me this
17th day of September, 1976

Haskel R. Barst
NOTARY PUBLIC

HASKEL R. BARST
Notary Public, State of New York
No. 30-5200500
Qualified in Nassau County
Commission Expires March 30, 1977

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

X

FRANCISCO BANARIA,
LUZUIMINDA BANARIA,
and
RIEL BANARIA,

Plaintiffs,

-against-

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION
SERVICE,

Defendant.

X

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

PHILIP J. KLEINER, being duly sworn, deposes and says:

1. I am an associate in the firm of Barst & Mukamal, attorneys for the plaintiffs, and that I make this affidavit in support of plaintiffs' motion for a preliminary injunction to bar defendant from effectuating their deportation from the United States.

2. That by letter dated April 6, 1976, plaintiffs requested that LUZUIMINDA BANARIA be placed back into H status nunc pro tunc by reason of the fact that she was unable to file a timely application for an extension of her H-1 visa due to the circumstances surrounding her pregnancy and the birth of a U.S. citizen child on March 21, 1975. (Exhibit "A")

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AFFIDAVIT
IN SUPPORT
OF PLAINTIFFS'
MOTION FOR A
PRELIMINARY
INJUNCTION

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That by letter dated May 4, 1976, defendant arbitrarily denied plaintiff's request for reinstatement to 'H' status. (Exhibit "B")

3. That defendant's denial came notwithstanding the fact that defendant had approved plaintiff's petition for an H-1 visa classification and that said approval was dated April 29, 1976 and that the approved petition was revalidated through April 29, 1977. (Exhibit "C")

4. That by letter dated May 12, 1976, plaintiffs' counsel requested that LUZUIMINDA RANARIA be granted indefinite voluntary departure on the grounds that she was eligible for same under Operations and Instructions Section 242.10(a)(6) which was terminated on July 31, 1972. That plaintiff was entitled to said grant of indefinite voluntary departure on the basis of her status as the holder of an approved third preference visa petition which was filed with defendant on August 2, 1972. (Exhibit "D")

That as appears more fully in plaintiff's complaint on file with this Court, the revocation of the aforementioned Operations and Instructions Section was accomplished in a manner contrary to law and more specifically contrary to the provisions of 5 U.S.C. 553 et. seq.

That by letter dated June 1, 1976, defendant denied plaintiff's request for extended voluntary departure. (Exhibit "E")

5. That on June 7, 1976, I appeared as counsel for plaintiffs at a deportation proceeding before an Immigration Judge in Albany, New York. That this deportation proceeding was commenced by the issuance of an Order to Show Cause dated March 30, 1976. (Exhibit "F")

6. That in the course of the aforementioned deportation proceeding, the Immigration Judge, Gordon Sachs, himself a former trial attorney in the same district, indicated on the record that he would have placed LUZUIMINDA BANARIA back into H status and he further observed that even though he lacked statutory authority to place Mrs. BANARIA back into status, he viewed the District Director's action as an abuse of discretion.

7. That upon information and belief, LUZUIMINDA BANARIA, is now and has for the period of her stay in the United States been working as a registered nurse, that is, in the same occupation in which she entered the United States originally with a H-1 visa. That the U.S. Department of Labor has determined that persons working as registered nurses are exempt from the provisions of 8 U.S.C. 1182 (a)(14) in that there has been found to be a shortage of registered nurses in this area of the United States.

8. That no previous application for the relief sought herein has been made.

9. That in the event that a preliminary injunction is not granted, plaintiffs will be denied access to the Courts of the United States and will not be permitted to prosecute their claim in this matter. Further, plaintiffs will suffer irreparable harm and injury should they be deported from the United States not only to themselves, but also in regard to RANDY BANARIA, the U.S. citizen child of LUZUIMINDA BANARIA and FRANCISCO BANARIA.

10. Plaintiffs have exhausted their administrative remedies in this matter.

11. That upon information and belief, all of the plaintiffs in this matter are persons of good moral character.

Sworn to before me this
17th day of September, 1976

Haskell R. Barst
NOTARY PUBLIC

HASKELL R. BARST
Notary Public, State of New York
No. 30-5200500
Qualified in Nassau County
Commission Expires March 30, 1977

Philip J. Kleiner
PHILIP J. KLEINER

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

X
FRANCISCO BANARIA,
LUZUIMINDA BANARIA,
and
RIEL BANARIA,

76 Civ. 352

Plaintiffs,

- against -

AFFIDAVIT

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION
SERVICE,

Defendant.

X
STATE OF NEW YORK)
)SS:
COUNTY OF ALBANY)

LUZUIMINDA BANARIA, being duly sworn, deposes and says:

1. That I am the plaintiff in the above captioned action and that I make this affidavit in support of plaintiffs' motion for a preliminary injunction.

2. That I entered in the United States on or about May 29, 1972 in H-1 status and at that time as well as at the present time I am a citizen of the Republic of Philippines.

3. That during my stay in the United States I have worked continuously as a registered nurse and that I am the beneficiary of an approved third preference visa petition on the basis of this occupation.

4. That prior to March 1975 I had made regular applications to the Immigration and Naturalization Service to extend my H-1 visa but due to the circumstances and complications attending my pregnancy and the birth of my U.S. citizen child, RANDY BANARIA, I was unable to file a timely application for extension of my H-1 visa.

5. That subsequent to my failure to file a timely application for extension of my H-1 visa, I did file such application and that said application was approved by a notice dated on or about April 29, 1976 and that the approved petition was validated through April 29, 1977.

6. That my imminent deportation from the United States would cause irreparable harm in that I will be unable to pursue this action and further that it will cause an extreme hardship to my U.S. citizen son, RANDY BANARIA.

7. That I have never been the subject of any criminal prosecution.

8. That I am the holder of file No. A19 320 146 and that I make this affidavit not only for myself but on behalf of my elder son, RIEL BANARIA, file number A21 425 017, who is also a plaintiff in this action.

LUZUIMINDA

LUZUIMINDA BANARIA

Sworn to before me this
20th day of September, 1976

[Signature]
NOTARY PUBLIC

EDWARD J. KIEHNER
Notary Public State of New York
No. 31-651-01 New York County
Comm. Expires March 30, 1977

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

X

FRANCISCO BANARIA,
LUZUIMINDA BANARIA,
and
RIEL BANARIA,

76 Civ. 352

AFFIDAVIT

Plaintiffs,

-against-

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION
SERVICE,

Defendant.

X

STATE OF NEW YORK)
COUNTY OF ALBANY) SS:

FRANCISCO BANARIA, being duly sworn, deposes and says:

1. I am the husband of LUZUIMINDA BANARIA and that I am a plaintiff in the above-captioned action.
2. That I join with my wife, LUZUIMINDA BANARIA, in her application for an order restraining the Immigration and Naturalization Service from effecting our deportation from the United States.
3. That I have read her affidavit which is annexed hereto

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and do hereby state under oath that the same is true in all respects as concerns her dealing with the Immigration and Naturalization Service and her immigration status. I wish to reaffirm her statement that if we were deported from the United States irreparable harm would result to our family and specifically to our United States citizen child, RANDY BANARIA.


FRANCISCO BANARIA

Sworn to before me this
20th day of September, 1976


NOTARY PUBLIC

Notary Public State of New York
No. 31-4516501 New York City
Exp. 12/31/77

April 6, 1976

Benedict Ferro, District Director
Immigration & Naturalization Service
68 Court Street
Buffalo, New York 14202

Re: Luzuiminda Banaria -A19 320 146
and family,
Riel Banaria -A21 425 017
Francisco Banaria -A21 415 016

Dear Mr. Ferro:

Enclosed please find a G-28 authorizing this office to represent the above-named persons.

By this letter we do formally request that Luzuiminda Banaria be placed back into H status nunc pro tunc as the circumstances of this case indicate a basis for such action. Mrs. Banaria, a nurse, gave birth on March 21, 1975 to a U.S. citizen son and as a result of the circumstances surrounding her pregnancy was unable to file an application for an extension of her H-1 visa. Subsequently, when her employer brought the matter of an extension to her attention, Mrs. Banaria proceeded to file for same. The result of her action was the issuance of an Order to Show Cause. It is to be noted that Mrs. Banaria has and is still working at the same hospital and has previously filed regularly for her extensions.

In view of the aforementioned we request that Mrs. Banaria be placed into H status nunc pro tunc and that proceedings in this matter be terminated.

It is further contended that since Mrs. Banaria is the beneficiary of an approved third preference visa petition,

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she is entitled to indefinite voluntary departure status along with her husband. We would appreciate your conferring indefinite voluntary departure status on the respondents and we do hereby request that the hearing scheduled for May 5, 1976 be adjourned without date pending a decision on this application.

Thank you for your consideration in this matter.

Very truly yours,

BARST & MUKAMAL

by: _____

Steven S. Mukamal

SSM/ty

encl.

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UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

PLEASE REFER TO THIS FILE NUMBER

Rm 442 US Post Office & Courthouse
Albany, New York 12207

Al9 320 146

May 4, 1976

BARST & MUKAMAL
Counsellors at Law
127 John Street
New York, New York 10038
ATTN: Mr Steven S. Mukamal

Dear Mr. Mukamal:

Reference is made to your letter of April 6, 1976, requesting reinstatement to status in behalf of your client, Mrs Luzviminda BANARIA.

A review of the file indicates that Mrs. BANARIA was admitted to the United States at NYC on 5/29/72 on the basis of a petition (I-129B) submitted in her behalf by Saratoga Hospital. She was authorized to remain, with extension, until April 30, 1975. Your letter states that subject was unable to file a timely application for extension of stay due to the birth of her child on March 21, 1975. No further action was taken until March 4, 1976 when a petition was submitted in her behalf by St Clare's Hospital on March 4, 1976. A delay of eleven months is not considered excusable on the basis of grounds, set forth in your letter. Mrs. BANARIA has also been employed by St Clare's Hospital since August 1973 without benefit of an approved petition, filed in her behalf by that employer. The file further indicates that she is the beneficiary of a third preference visa petition, approved at Albany, New York on July 16, 1973. Subject does not appear to be a bonafide nonimmigrant, in that it has not been established that she intends to depart from the United States within a definite time and that she has a residence abroad to which she intends to return.

In view of the foregoing, the request for reinstatement to status is hereby denied. Mrs. BANARIA is scheduled to appear for a hearing before the Immigration Judge at Albany, New York on May 5, 1976.

Very truly yours,

Donald S. Long
Acting Officer in Charge

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BEST COPY AVAILABLE

Immigration and Naturalization Service
At 142 Court Office Court House
New York, New York 10012 12207

**NOTICE OF APPROVAL OF NONIMMIGRANT VISA PETITION OR
OF EXTENSION OF STAY OF NONIMMIGRANT H OR L ALIEN** 4/5 19 200 1976

NAME AND ADDRESS OF EMPLOYER OR TRAINER

St Clare's Hospital
600 W. Clifton Street
Schenectady, New York 12301

NAME OF BENEFICIARY OR BENEFICIARIES

CLASSIFICATION

215(1)(1)

FILE NO.

DATE OF APPROVAL

4-23-76

PLEASE BE ADVISED THAT APPROVAL OF THE PETITION CONSTITUTES A DETERMINATION THAT THE BENEFICIARY IS CLASSIFIABLE UNDER A SPECIFIED NONIMMIGRANT CLASSIFICATION. THE APPROVAL CONSTITUTES NO ASSURANCE THAT THE BENEFICIARY WILL BE FOUND ELIGIBLE FOR VISA ISSUANCE. ADMISSION TO THE UNITED STATES OR CHANGE OF NONIMMIGRANT STATUS. ELIGIBILITY FOR VISA ISSUANCE IS DETERMINED ONLY WHEN APPLICATION THEREFOR IS MADE TO A CONSULAR OFFICER. ELIGIBILITY FOR ADMISSION OR CHANGE OF STATUS IS DETERMINED ONLY WHEN APPLICATION THEREFOR IS MADE TO AN IMMIGRATION OFFICER. ALSO, PLEASE NOTE THE ITEMS BELOW WHICH ARE INDICATED BY "X" MARKS CONCERNING THIS PETITION:

- ☐ THE PETITION HAS BEEN APPROVED AND FORWARDED TO THE UNITED STATES CONSULATE AT WHICH THE BENEFICIARY OR BENEFICIARIES WILL APPLY FOR VISA ISSUANCE. ANY INQUIRY CONCERNING VISA ISSUANCE SHOULD BE DIRECTED TO THE CONSULATE AT _____.

THIS SERVICE WILL BE UNABLE TO ANSWER ANY INQUIRY CONCERNING VISA ISSUANCE.

- ☐ THE PETITION HAS BEEN APPROVED. IT IS INDICATED THAT THE BENEFICIARY(IES) WILL NOT REQUIRE VISA(S) TO ENTER THE UNITED STATES. NOTICE OF APPROVAL OF THE PETITION HAS BEEN FORWARDED TO THE INTENDED UNITED STATES PORT OF ENTRY. PLEASE NOTIFY THIS OFFICE IMMEDIATELY OF ANY CHANGE IN THE INTENDED PORT OF ENTRY.

- ☒ THE APPROVED PETITION IS VALID UNTIL April 22, 1977

- ☐ THE TEMPORARY STAY OF THE BENEFICIARY(IES) IS AUTHORIZED TO _____.

- ☒ REMARKS: The beneficiary is scheduled to appear at a hearing on May 5, 1976 regarding her immigration status.

- ☐ DOCUMENTS WHICH YOU SUBMITTED IN SUPPORT OF YOUR PETITION HAVE SERVED OUR PURPOSE AND ARE RETURNED

IMPORTANT

1. THE BENEFICIARY(IES) OF YOUR NONIMMIGRANT VISA PETITION MAY NOT REMAIN IN THE U.S. BEYOND THE PERIOD FOR WHICH THE PETITION IS VALID OR ANY EXTENSION OF STAY AUTHORIZED BY THIS SERVICE.
2. YOU ARE REQUIRED TO NOTIFY THIS OFFICE PROMPTLY IF THE EMPLOYMENT OR TRAINING SPECIFIED IN THIS PETITION IS TERMINATED BEFORE THE EXPIRATION OF THE AUTHORIZED STAY IN THE UNITED STATES OF THE BENEFICIARY(IES).
3. PLEASE ADVISE THE BENEFICIARY(IES) THAT THE ACCEPTANCE OF EMPLOYMENT OR TRAINING NOT SPECIFIED IN THIS PETITION WILL BE A VIOLATION OF NONIMMIGRANT STATUS.

INFORMATION REGARDING BENEFICIARY'S DEPARTURE AND RETURN

DO NOT MAKE COPIES OF THIS NOTICE. YOU MAY FURNISH IT TO ONLY ONE INDIVIDUAL BENEFICIARY WHO DESIRES TO DEPART FROM AND RETURN TO THE UNITED STATES TO RESUME THE SAME EMPLOYMENT OR TRAINING DURING THE PERIOD FOR WHICH THE PETITION IS VALID OR FOR WHICH HIS STAY IN THIS COUNTRY HAS BEEN AUTHORIZED. ANY ADDITIONAL BENEFICIARY WHO WILL BE DOING SO MAY BE REFERRED TO THIS OFFICE FOR ISSUANCE OF A SIMILAR FORM. IF A BENEFICIARY HAS AN "H" OR "L" VISA WHICH HAS EXPIRED, HE MAY APPLY TO THE DIRECTOR, VISA OFFICE, DEPARTMENT OF STATE, WASHINGTON, D.C., FOR REVALIDATION OF THAT VISA PRIOR TO DEPARTURE AND MAY SUBMIT THIS NOTICE WITH THAT APPLICATION. ALTERNATIVELY, IF A NEW VISA IS REQUIRED, HE SHOULD PRESENT THIS NOTICE TO AN AMERICAN CONSUL ABROAD. IF HE IS EXEMPT FROM THE VISA REQUIREMENT, HE SHOULD PRESENT THIS NOTICE AT A UNITED STATES PORT OF ENTRY. IF THE BENEFICIARY DESIRES TO RETURN TO THE SAME EMPLOYMENT OR TRAINING AFTER THE EXPIRATION OF THE VALIDITY OF THE PETITION OR AUTHORIZED TEMPORARY STAY SHOWN IN THIS FORM, A NEW PETITION WILL BE REQUIRED. THE BENEFICIARY MAY BE READMITTED TO THIS COUNTRY ONLY IF FOUND ADMISSIBLE UNDER THE IMMIGRATION LAWS WHEN HE RETURNS.

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

NOTICE OF ☒ THIRD ☐ SIXTH PREFERENCE PETITION APPROVED UNDER SECTION 203(a)
OF THE IMMIGRATION AND NATIONALITY ACT, AS AMENDED.

IMPORTANT: IF THIS PETITION HAS BEEN APPROVED FOR SIXTH PREFERENCE AND
IF CONDITIONS CHANGE SO THAT YOU DO NOT INTEND TO EMPLOY THE BENEFICIARY,
NOTIFY THIS OFFICE IMMEDIATELY.

Name of Beneficiary LUZUIMINDA BAGURU BANARIA		File No. A19 320 145	Date of Notice July 16, 1973
Country of birth Philippines	Occupation Nurse	Date Petition Filed 8/2/1972	

VALIDITY: The approval of a petition for third or sixth preference classification is valid for as long as the supporting labor certification is valid and unexpired, provided in the case of a petition for third preference classification there is no change in the beneficiary's intention to engage in the indicated profession, art or science, and provided in the case of a petition for sixth preference classification there is no change in the respective intentions of the petitioner and the beneficiary that the beneficiary will be employed by the petitioner in the capacity indicated in the petition.

Please be advised that approval of the petitions confers upon the beneficiary an appropriate classification and, otherwise, has no bearing on the beneficiary's eligibility for a visa or admissibility to the United States under the immigration laws. Also, please note the items below which are indicated by "X" marks concerning this petition:

- ☐ Your petition for preference classification has been approved by the Service and forwarded to the United States Consulate at _____. This completes all action by this Service on the petition. This Service has nothing to do with the actual issuance of visas. Visas are issued only by a United States Consul, who is under the jurisdiction of the U.S. Department of State. Under the law only a limited number of visas may be issued by that Department during each year and they must be issued strictly in the chronological order in which petitions were filed for the same classification. When the beneficiary's turn is reached on the visa waiting list, the United States Consul will inform him and consider issuance of the visa. *Inquiry concerning visa issuance should be addressed to the Consul. This Service will be unable to answer any inquiry concerning visa issuance.*
- ☐ The petition has been approved. The petition states that the beneficiary is in the United States and will apply to become a lawful permanent resident. The enclosed application for this purpose (Form I-485) should be completed and submitted by the beneficiary in accordance with the instructions contained therein. (If the beneficiary had previously submitted Form I-485 which was returned to him, he should resubmit that form.)
- ☐ The petition has been approved. The beneficiary will be informed of the decision made on his pending application to become a lawful permanent resident (Form I-485).
- ☒ The petition has been approved. The petition states that the beneficiary is in the United States and will apply for adjustment of status to that of a lawful permanent resident. A visa number is not presently available; therefore, the beneficiary may not now apply for adjustment of status to that of a permanent resident.

☐ Remarks:

MAIL TO NAME AND ADDRESS OF PETITIONER

Luzuiminda Baguru Banaria
4 Bryan Street
Saratoga Spa, N.Y. 12866

Very truly yours,
[Signature]
Officer in Charge
DISTRICT DIRECTOR

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UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

PLEASE REFER TO THIS FILE NUMBER

United States Court House
Buffalo, New York 14202

A19 360 146

June 1, 1976

Barst & Mukamal
Counselors at Law
127 John Street
New York, New York 10038

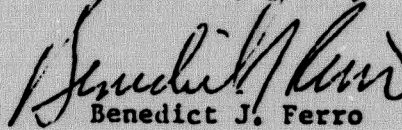
Dear Sirs:

Reference is made to your letter of May 12, 1976, which requested that Luzviminda Banaria be granted indefinite voluntary departure.

Please be advised that OI 242.10(a)(6) which provided such voluntary departure was terminated effective July 31, 1972 except for aliens already in voluntary departure status under that Operations Instruction; or a "PSA" alien in the United States on July 31, 1972 for whom an approved third or sixth preference petition was filed on or before that date; or "PSA" alien native of an independent Western Hemisphere country or of the Canal Zone who is in the United States on July 31, 1972 and who had applied for an immigrant visa on or before that date.

The record indicates that the subjects's third preference petition approved by this office on August 27, 1973, was filed on August 2, 1972. She was therefore ineligible for consideration for extended voluntary departure on the basis of that petition.

Very truly yours,


Benedict J. Ferro
District Director

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of)

LUZVIMINDA BANARIA)

Respondent.)

To: Mrs. Luzviminda Banaria & son, RIEL

File No.

A19 320 146 &
A21 425 017

3312 Woodlawn Avenue

Schenectady, New York

Address (number, street, city, state, and ZIP code)

A-1425-b

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Philippines
and a citizen of Philippines;
3. You entered the United States at New York, New York on
or about May 29, 1972;
4. At that time you were admitted as a temporary nonimmigrant, nurse,
and were authorized to remain in the United States until April 30, 1975;
5. You have remained in the United States beyond April 30, 1975, without
authority of the U. S. Immigration and Naturalization Service.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Sec. 241(c)(2) of the Immigration and Nationality Act in that, as a nonimmigrant, you have remained in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the Immigration and Naturalization Service of the United States Department of Justice at Room 442, U. S. Post Office Building, Broadway, Albany, NY on WEDNESDAY, MAY 5, 1976 at 9:00 A. m. and show cause why you should not be deported from the United States on the charge(s) set forth above.

Dated: MARCH 30, 1976

Form I-221
(Rev. 3-30-67)

IMMIGRATION AND NATURALIZATION SE

James Harrigan
(signature and title of issuing officer)
JAMES HARRIGAN
Acting Officer in Charge, Albany, New York
(City and State)

(over)

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UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

ORDER TO SHOW CAUSE and NOTICE OF HEARING

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA:

In the Matter of

FRANCISCO T. BANARIA

Respondent.

To: Mr. Francisco T. Banaria

File No. A21 425 016

3312 Woodlawn Avenue
Schenectady, New York

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Philippines
and a citizen of Philippines;
3. You entered the United States at New York, New York on
or about May 29, 1972;
4. At that time ^(date) you were admitted as a temporary nonimmigrant, H-4
spouse, and were authorized to remain in the United States until April 30,
1975;
5. You have remained in the United States beyond April 30, 1975, without the
authority of the U. S. Immigration and Naturalization Service.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Sec. 241(a)(2) of the Immigration and Nationality
Act, in that, after admission as a nonimmigrant
(1) you have remained
in the United States for a longer time than permitted.

WHEREFORE, YOU ARE ORDERED to appear for hearing before a Special Inquiry Officer of the
Immigration and Naturalization Service of the United States Department of Justice at Room 442,
U. S. Post Office Building, Broadway, Albany, NY
on WEDNESDAY, MAY 5, 1976 at 9:30 A. m, and show cause why you should not be deported
from the United States on the charge(s) set forth above.

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Dated: MARCH 30, 1976

IMMIGRATION AND NATURALIZATION SERVICE

Form I-221
(Rev. 3-30-67)

James Harrigan
(signature and title of issuing officer)
JAMES HARRIGAN
Acting Officer in Charge, Albany, New York
(City and State)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCISCO PANARIA, LUZUIMINDA BANARIA,
AND RIEL BANARIA,

Plaintiffs,

ANSWERING AFFIDAVIT

-vs-

CIVIL NO. 76-CV-352

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION
SERVICE,

Defendant.

STATE OF NEW YORK }
COUNTY OF ALBANY } ss.:

RICHARD K. HUGHES, being duly sworn, deposes and
says:

1. That I am an Assistant to James M. Sullivan, Jr.,
the United States Attorney for the Northern District of New
York, the attorney for the defendant in the above-captioned
action.

2. That this civil action, seeking declaratory and preliminary injunctive relief but not a writ of habeas corpus, was commenced on September 1, 1976, that the U.S. Attorney was personally served with copies of process and pleadings on September 8, 1976, and that the defendant's time to respond to the complaint will expire on or about November 8, 1976.

3. That this Affidavit is filed by the defendant in opposition to the plaintiffs' application for a temporary restraining order, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, staying enforcement by the Immigration and Naturalization Service of an oral decision and order of deportation, issued by a special inquiry officer of the Immigration and Naturalization Service, on or about June 17, 1976, and the defendant's execution of a warrant of deportation issued pursuant to that order.

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4. That upon information and belief, after timely notice, the plaintiff, LUZUIMINDA BANARIA, a citizen of the Philippines, was afforded an oral administrative hearing before an impartial special inquiry officer of the Immigration and Naturalization Service on June 17, 1976, that plaintiff, LUZUIMINDA BANARIA, was then represented by competent counsel, that at said hearing, the plaintiff, LUZUIMINDA BANARIA, only challenged the defendant's prior refusal to reinstate her lapsed "H" visa on account of said plaintiff's inexcusable neglect, that is, said plaintiff had delayed for more than one year, after the normal expiration date, in making her application for renewal of her preferred alien "H" visa and her authority to remain in the United States.

5. That upon information and belief, the oral decision and order of the special inquiry officer denied the administrative petition of the plaintiff, LUZUIMINDA BANARIA, for reinstatement, and ordered said plaintiff to be deported by the Immigration and Naturalization Service to the Philippines,

that this decision and order was stayed until September 7, 1976, to enable the plaintiffs to voluntarily depart the United States, which they have failed to do.

6. That upon information and belief, the plaintiff, LUZUIMINDA BANARIA, never filed a timely appeal from the June 17, 1976 adverse oral decision and order of the special inquiry officer to the Board of Immigration Appeals within the ten day period provided for under Title 28, Code of Federal Regulations Section 242.21, and that plaintiffs have therefore failed to timely exhaust their available administrative remedies.

7. That as was held by the Second Circuit in Noel v. Chapman, 508 F.2d 1023, 1029-1030, the internal policy and

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procedures of the Immigration and Naturalization Service, including the Service's Operations and Instructions Manual §242.10, a copy of which is attached hereto and which is presently being challenged by the plaintiffs in their second claim for relief, are "general statements of policy" and the Administrative Procedure Act, 5 U.S.C. §553(b)(A), specifically "exempts 'general statements of policy' from the notice requirements of section 553(b)," and that therefore there is little likelihood of plaintiffs' ultimate success on the merits of this second claim for relief.

WHEREFORE, deponent respectfully requests that the plaintiffs' application for a temporary restraining order be denied.

Richard K. Hughes
RICHARD K. HUGHES

SWORN TO BEFORE ME THIS

17th DAY OF SEPTEMBER, 1976

Judith A. Paiko
NOTARY PUBLIC

JUDITH A. PAIKO
Notary Public, State of New York
Qualified in Albany County
Commission Expires March 30 1977

242.8 Transcription of testimony and decision. Deportation-hearing testimony need not be transcribed if the decision of the special inquiry officer is final and permission to review or borrow a copy of it has not been requested.

When the special inquiry officer renders an oral decision, it shall not be transcribed unless it is appealed or certified, the respondent or the Service requests a copy, suspension of deportation is granted, or the special inquiry officer deems transcription necessary. An oral decision shall be transcribed when the special inquiry officer grants an application which was denied by the district director so that a copy may be filed in the public reading room in accordance with OI 103.8. If the oral decision is not transcribed, the special inquiry officer shall prepare and sign a memorandum for the file reflecting the date of hearing, that the decision was oral, that appeal was waived and a copy of the decision not requested, that the charge in the order to show cause and lodged charges were or were not sustained, the applications filed, the country to which the alien prefers to go if deported, and a succinct yet comprehensive denotation of the order, including the disposition of any applications.

242.10 Voluntary departure prior to commencement of hearing. (a) Authorization. Voluntary departure may be granted to any alien who is statutorily eligible therefor (1) who is a native of a foreign contiguous territory and not within the purview of class (6)(i) or (ii) of this paragraph; or (2) whose application for extension of stay as a nonimmigrant is being denied or (3) who has voluntarily surrendered himself to the Service; or (4) who presents a valid travel document and confirmed reservation for transportation out of the United States within 30 days; or (5) who is an F-1, F-2,

J-1, or J-2 nonimmigrant and who has lost such status solely because of a private bill introduced in his behalf; or (6) who is admissible to the United States as an immigrant and (i) who is an immediate relative of a United States citizen or is otherwise exempt from the numerical limitation on immigrant visa issuance, or has a priority date for an immigrant visa not more than 60 days later than the date shown in the latest Visa Office Bulletin, and has applied for an immigrant visa at an American consulate which has accepted jurisdiction over the case; or (ii) who is a native of an independent country of the Western Hemisphere or the Canal Zone, has been in the United States since a date prior to April 11, 1973, and who on April 10, 1973 was and continues to be an immediate relative of a United States citizen, or the unmarried son or unmarried daughter of a United States citizen, or the spouse or unmarried son or unmarried daughter of a lawful permanent resident alien; or (7) any alien who has been granted asylum and who has not been granted parole status or a stay of deportation; or (8) in whose case the district director has determined there are compelling factors warranting grant of voluntary departure. (Revised)

In cases within the jurisdiction of investigations, the authority of the district officer in charge of investigations or the officer in charge under 8 CFR 242.5 to grant or revoke voluntary departure prior to the commencement of hearing shall not be re-delegated. The authority of chief patrol agents shall not be redelegated.

The respondent's nonimmigrant visa shall be cancelled, or his border crossing card voided, upon his acceptance of a grant of voluntary departure prior to the institution of deportation proceedings

pursuant to 8 CFR 242.5 (see OI's 212.9 and 212.10 for endorsement to be used in physically cancelling visas and OI 287.9 for report to be submitted).

When prior approval of an application for an order to show cause is required by OI 242.1(a), the alien shall not be advised or notified that he must depart unless or until such approval has been received.

(b) Periods of time. (1) General. Except for classes (5), (6), (7), and (8) of paragraph (a), any grant of voluntary departure shall contain a time limitation of usually not more than 30 days, and an extension of the original voluntary departure time shall not be authorized except under meritorious circumstances. Upon failure to depart, deportation proceedings will be pursued. Class (5) may be granted voluntary departure in increments of one year conditioned upon the F-1 or J-1 alien maintaining a full course of study at an approved institution of learning, or upon abiding by the terms and conditions of the exchange program within the limitations imposed by 22 CFR 63.23. Class (6) (i) may be granted voluntary departure until the American consul is ready to issue an immigrant visa and, in the discretion of the district director, may be in increments of 30 days, conditioned upon continuing availability of an immigrant visa as shown in the latest Visa Office Bulletin and upon the alien's diligent pursuit of efforts to obtain the visa. Classes (6)(ii), (7), and (8) may be granted voluntary departure in increments of time, not to exceed one year, as determined by the district director to be appropriate in the case. Form I-94 issued to an alien granted voluntary departure, who is within class (5), (6), (7), or (8) of paragraph (a) may be stamped with the legend "EMPLOYMENT AUTHORIZED" if the alien seeks some indication from the Service that he is entitled to be employed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCISCO BANARIA, LUZUIMINDA BANARIA, AND
RIEL BANARIA,

Plaintiffs,

-against-

76-CV-352

BENEDICT FERRO, DISTRICT DIRECTOR,
IMMIGRATION AND NATURALIZATION SERVICE,

Defendant.

APPEARANCES:

BARST & MUKAMAL
Attorneys for Plaintiffs
127 John Street
New York, New York 10038

JAMES M. SULLIVAN, JR.
United States Attorney
Attorney for Defendant
Federal P. O. Building
Syracuse, New York 13201

OF COUNSEL:

PHILIP J. KLEINER

RICHARD K. HUGHES
Assistant U.S. Attorney
Federal P.O. Building
Albany, New York 12207

JAMES T. FOLEY, D.J.

MEMORANDUM-DECISION and ORDER

Plaintiffs, mother, father and son, are aliens, nationals of the Philippines, who were ordered deported from the United States after a deportation hearing conducted on June 7, 1976. This order was stayed administratively pending voluntary departure on or before September 7, 1976.

Plaintiffs took no appeal from this order nor did they depart by September 7, 1976. While under a pending Warrant of Deportation issued pursuant to 8 C.F.R. §243.2, plaintiffs applied to this Court for an Order to Show Cause containing a Stay of Deportation which ordered that "all proceedings to effectuate the deportation of [plaintiffs] . . . be stayed from this date until a final determination." Defendants subsequently, through the government attorney, consented to defer further action on the deportation warrant until the motion for the preliminary injunction could be heard at the regular motion day to be held in Albany, New York on October 18,

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1976, and until Court decision thereafter.

The complaint presents two claims, ~~being~~ jurisdiction upon the Administrative Procedure Act, 5 U.S.C. §704 et seq., and requests relief in the form of a Declaratory Judgment under 28 U.S.C. §2201 as well as injunctive relief under Fed. R. Civ. Pro. 65(a).

The First Claim is that defendant Ferro, as District Director of the Immigration and Naturalization Service [I.N.S.] arbitrarily and capriciously refused to excuse plaintiff, Luzuiminda Banaria, for filing her application to renew her "H" visa approximately eleven months late. See Order to Show Cause, Exhibits A and B.

The Second Claim is that the I.N.S. arbitrarily and in violation of plaintiffs' Fifth Amendment Rights of the Constitution of the United States did not follow and did in effect revoke Section 242.10 (a)(6)(ii) of their Operations and Instructions Manual which provided for a policy of granting extended indefinite voluntary departure for beneficiaries of approved third preference visa petitions. Plaintiffs claim that the revocation of this section was done without compliance with the notice and publication procedures of the Administrative Procedure Act. See 5 U.S.C. 553(b). It is alleged that plaintiff Luzuiminda Banaria, the mother and wife, is the beneficiary of such a third preference visa petition granted July 16, 1973, pursuant to 8 U.S.C. §1153(a)(3), and extension of this by indefinite voluntary departure was denied by the District Director by letter of May 4, 1976. See Order to Show Cause, Exhibits B and E.

The immigrant status of plaintiffs, Francisco and Riel Banaria, as husband and child of Luzuiminda, is dependent upon her approved third preference visa petition. See 8 U.S.C. §1151(a) and (b). On or about March 21, 1975, Luzuiminda gave birth to a child while in the United States. This child, as a United States Citizen, is not a named party herein, yet the birth and attendant complications form the basis for plaintiffs' claim that the eleven months delay in applying to renew her visa should be excused by I.N.S.

It must be emphasized at the onset that this is a motion for a preliminary injunction which:

will issue "only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief."

Triebwasser & Katz v. American Telephone and Telegraph Co., 535 F.2d 1356, 1358 (2d Cir. 1976), citing *Sonesta Int'l Hotels v. Wellington Associates*, 483 F.2d 247, 250 (2d Cir. 1973). (emphasis in original).

For purposes of this motion, I see no need to belabor the irreparable injury or balance of hardship factors because there is little doubt that the severity of deportation to plaintiffs, as always in these situations, entails both. However, in my judgment, serious problems of jurisdiction, including a failure to exhaust administrative appeals, indicate little merit on the First Claim, and the lack of merit under the Second Claim is apparent under settled case law. Therefore, the motion for a preliminary injunction must be denied.

It is important to understand the facts here, particularly the time sequence of events that lead to the order of deportation. Involved in this challenge is not only the issue of administrative exhaustion, but also whether this District Court or the Court of Appeals, Second Circuit, is the proper venue for the instant challenge under Section 106(a) of the Immigration and Nationality Act, 8 U.S.C. §1105(a)(2).

On March 30, 1976, an Order to Show Cause and Notice of Hearing was issued to Luzuiminda Banaria, as Respondent, to show cause why she should not be deported. One of the grounds listed in the notice was the fact that she had remained in the United States without the authority of I.N.S., i.e., her visa expired on April 30, 1975. See Order to Show Cause, Exhibit F.

Thereafter, on April 6, 1976, plaintiffs, by their attorneys, sent a letter to defendant Ferro, as District Director, requesting

that Luzuiminda be placed back into "H" visa status nunc pro tunc. This letter recited that circumstances surrounding her pregnancy and birth excused her lateness of almost a year in filing for renewal. See Order to Show Cause, Exhibit A.

On May 4, 1976, the District Director's delegate, the Acting Officer in Charge, responded by denying reinstatement to "H" status advising that the reasons in plaintiff Luzuiminda's request did not provide sufficient excuse and also because the "[s]ubject does not appear to be a bonafide nonimmigrant" based on the lack of a definite departure time from the United States and a residence abroad. See Exhibit B.

Also worthy of note is the application by and Notice of Approval to St. Clare's Hospital, Luzuiminda's employer, that she "is classifiable" for "H" visa status. On this notice is the "Remark" or qualification that Luzuiminda was scheduled for her deportation hearing on May 5, 1976.

Immigration Judge Gordon W. Sacks rendered his oral decision on June 7, 1976, see 8 C.F.R. §242.19(b), ordering the alien plaintiffs deported. This was a full and impartial hearing pursuant to Section 242(b) of the Immigration and Nationality Act, 8 U.S.C. §1252(b) and Part 242 of the Regulations, where plaintiffs were ✓ represented by counsel who were expert in immigration matters. No appeal was taken from this order under 8 C.F.R. §242.21 to the Board of Immigration Appeals, and thus the order became final. See 8 C.F.R. §242.20.

It is the position of plaintiffs, ✓ substantially clarified by their counsel at oral argument, that they do not challenge their deportation hearing, its procedure, or the final order of deportation. Rather, they claim that the District Director arbitrarily and capriciously refused to reinstate Luzuiminda's "H" visa status even after notice of the impending hearing was given. Immigration Judge Sacks considered the decision of the Acting Officer in Charge

denying reinstatement to "H" status nunc pro tunc in his letter of May 4, 1976. [Exhibit B]. The ruling reflected both in his oral decision and in the administrative transcript was that the letter which was "a denial of extension is in some form attackable but it is clear that so long as there is any reasonable basis upon which to make such a determination I cannot in any way be involved in the matter because it is without my purview." Administrative Transcript at p. 12; see also Transcription of Oral Decision at p. 2.

From a reading of the Administrative Transcript, it is clear that this District Court action was contemplated and planned even before the deportation hearing commenced. See Administrative Transcript, pp. 6-9. It should also be noted that the hearing before the Immigration Judge seemed to be concerned mainly with possible persecution in the Philippines of the plaintiffs if they were deported.

Thus, the strategy of plaintiffs' position in trying to separate the District Director's decision from the deportation hearing becomes clear in light of the Supreme Court decision interpreting the venue provision of the Immigration and Nationality Act, Section 106(a), 8 U.S.C. §1105a (a)(2), which provides that: "the venue of any petition for review under this section shall be in the judicial circuit . . .".

In *Cheng Fan Kwok v. Immigration Service*, 392 U.S. 206 (1968), the Court said that:

[t]hese procedures [§106(a)] vest in the courts of appeals exclusive jurisdiction to review final orders issued by specified federal agencies. In situations to which the provisions of §106(a) are inapplicable, the alien's remedies would, of course, ordinarily lie first in an action brought in an appropriate district court.

Id., 209-210.

By reading section 106(a) "with precision and fidelity", the Court narrowed the scope of its application:

We hold that the judicial review provisions of §106(a) embrace only those determinations made during a proceeding conducted under

§242(b), including those determinations made incident to a motion to reopen such proceedings.

Id., at 216.

It is thus that plaintiffs seek to characterize the District Director's denial of "H" visa reinstatement as divorced from the deportation hearings, for if the action by the District Director and the final order of deportation are "intimately and immediately associated", then §106(a) applies and "the sole and exclusive procedure for the judicial review" would be in the Court of Appeals, Second Circuit. *Cheng Fan Kwok v. Immigration Service*, supra, 392 U.S. at 217.

In a recent opinion, the Court of Appeals, Second Circuit, used similar language to hold that §106(a) applied when "the denial of discretionary relief is so intimately connected with a deportation proceeding that the two should be heard together in direct review by the Court of Appeals." *Colato v. Immigration and Naturalization Service*, 531 F.2d 678, 680 (2d Cir. 1976).

Both from the time frame of the application to the District Director for an "H" visa nunc pro tunc, and the fact that this was one of the very issues noticed and tried in the deportation hearing, it is clear to me that the letter of May 4, 1976, from the office of the District Director and the notice to St. Clare's Hospital reflect the position that these decisions were made within the context of a pending deportation notice and hearing. These actions are, in my judgment, intimately, immediately, and inextricably, related and part and parcel of the deportation proceedings. The Immigration Judge found the denial of excusable delay to be reasonable and therefore beyond his jurisdiction to review.

A similar situation was presented to the district court in *Shodeke v. Attorney General of United States*, 391 F. Supp. 219 (D.D.C. 1975), where the plaintiff claimed that their challenge was not to the deportation order per se, but rather to the consti-

tutional and statutory underpinnings of the order, and

[h]ence, they say, this case does not seek review of a final deportation order. . . . Their theory would take matters urged before the administrative tribunals as defenses to the deportation order and convert them to something else before this Court. What we have here is no more than a request, based on constitutional grounds, to review a final deportation order. Such matters are for the Court of Appeals.

Id., 391 F. Supp. at 221-222.

I, therefore, do not accept plaintiffs' characterization of their challenge here under the First Claim as relating only to the District Director's letter of May 4, 1976, denying reinstatement of "H" status. The plaintiffs were on notice before they ever made their application for reinstatement, that a deportation hearing would be held on that very issue of whether there was excusable neglect for their waiting eleven months before making such an application. It is on this issue that plaintiffs, I believe, should have filed an appeal to the Board of Immigration Appeals under the regulations [see 8 C.F.R. §242.21]. Their letter of April 6, 1976, was apparently an attempt to short-cut the deportation hearing, as the instant suit attempts to avoid the appeals processes required by the Immigration and Nationality Act, Section 106(a). In my judgment, therefore, exclusive jurisdiction of this suit lies with the Court of Appeals, Second Circuit, because the decision of the District Director challenged here was

✓ "'an integral part of the proceedings which have led to the issuance of a final deportation order'". Cheng Fan Kwok v. Immigration Service, supra, citing, Foti v. Immigration Service, 375 U.S. 217, 222 (1963).

Assuming arguendo, that jurisdiction may properly be invoked in this District Court, two further reasons indicate that any likelihood of success on the merits is minimal. First, it is settled law under the Immigration and Nationality Act that exhaustion of all available administrative procedures is a prerequisite for judicial review.

✓ The failure to exhaust administrative remedies in deportation proceedings has been uniformly held to preclude judicial review. * * * Accordingly, the failure to exhaust administrative remedies warrants dismissal of an action seeking judicial review of a District Director's determination.

Yan Wo Cheng v. Rinaldi, 389 F. Supp. 583, 590 (D.N.J. 1975) (and cases cited therein); see also Luna-Benalcazar v. Immigration and Naturalization Service, 414 F.2d 254, 255 (6th Cir. 1969) (per curiam); Chung Chaw Wa v. Immigration and Naturalization Service, 407 F.2d 854 (1st Cir. 1969) (per curiam); Roumeliotis v. Immigration and Naturalization Service, 354 F.2d 236 (7th Cir. 1966) (per curiam), cert. denied, 384 U.S. 907 (1966).

As the decisions of Yan Wo Cheng v. Rinaldi, supra, and Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971) indicate, appeals must be taken from the decision of the special inquiry officer in a deportation proceeding as well as any other relief available. See In Ja Kim v. Immigration & Naturalization Service, 403 F.2d 636, 637 (7th Cir. 1968), citing Cheng Fan Kwok v. Immigration Service, supra.

This administrative exhaustion is statutory mandated.

Section 106(c) of the Immigration and Nationality Act, 8 U.S.C.A. §1105a (c) provides when a person has failed to appeal to the Board of Immigration Appeals, the failure to exhaust an available administrative remedy operates to deny him judicial review. * * *

Mavronas v. Ryan, 227 F. Supp. 944, 946 (D. Conn. 1963).

Finally, even if review of the District Director's denial of reinstatement was reviewable in this District Court in the instant case, the plaintiffs have not met their burden of proving a likelihood of success in showing it was arbitrary and capricious. There is no affidavit presented which details the extent of Luzuiminda's medical problems and which would justify a finding here that the eleven months delay in applying for her visa renewal should have been accepted as excusable by the District Director. Similarly, no details were apparently provided to the District Director in plaintiffs' letter of April 6, 1976, nor during the deportation

proceeding.

The decision of the District Director would be conclusive if supported by reasonable, substantial and probative evidence and entitled to be given great weight here. *Song Jook Suh v. Rosenberg*, supra, 437 F.2d at 1102; *Armstrong v. Immigration and Naturalization Service*, 445 F.2d 1395, 1396 (9th Cir. 1971) (per curiam). Moreover, the decision is committed to the discretion of the Director who must determine if there was "excusable" delay. See 8 C.F.R. §214.1(a). Plaintiffs have failed to show that there is a clear likelihood of success in showing that the District Director's decision was made without rational explanation, or inexplicably departed from established policies, or rested on an impermissible basis. *Dimaren v. Immigration and Naturalization Service*, 398 F. Supp. 556, 560 (S.D. N.Y. 1974); see *Wong Wing Hang v. Immigration and Naturalization Service*, 360 F.2d 715, 719 (2d Cir. 1966).

The Second Claim in the complaint is also of insufficient merit, in my judgment, to justify a preliminary injunction here in light of recent cases involving similar, though not identical, regulations.

Plaintiffs claim that the revocation of Section 242.10(a)(6) (ii) of the Service's Operations and Instructions [IO] Manual, which formerly provided for the extension of third preference visas, was done without notice and publication in the Federal Register pursuant to 5 U.S.C. §§552-553. Defendant argues that such action is exempt from notice and publication requirements under the Administrative Procedure Act, 5 U.S.C. §§551 and 553 (a) and (c).

In *Noel v. Chapman*, 508 F.2d 1023 (2d Cir. 1975), cert.denied, 423 U.S. 824 (1975), the Court of Appeals, Second Circuit, held that similar regulations were "general statements of policy" and thereby exempt. The Court said:

We cannot conclude that the instructions at issue here changed the existing right of the appellants to have applications for extensions of time to depart authorized

in the sole discretion of the district director.

Id., 508 F.2d at 1030.

These similar IO manual sections, referred to above, I think are little more than guidelines for the operation of the Immigration and Naturalization Service and created no legal rights directly for plaintiffs. Cf. Yan Wo Cheng v. Rinaldi, supra, 389 F. Supp. at 588-589.

The Immigration and Naturalization Service must have the ability and flexibility to liberalize or constrict its policies, as it often has done. See Fan Wak Keung v. Immigration and Naturalization Service, 434 F.2d 301, 306 (2d Cir. 1970). In such matters, the district directors must have guidelines and such regulations merely give direction for the exercise of discretions within national policy. See Dimaren v. Immigration and Naturalization Service, supra, 398 F. Supp. at 559.

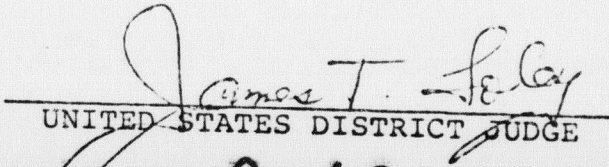
It is my judgment, therefore, that there is little likelihood of success of plaintiffs showing that jurisdiction exists in this Court to adjudicate either of their claims or that there is sufficient merit even if the claims were reached.

My findings of fact and conclusions of law under Fed. R. Civ. Pro. 52(a) are contained herein. The motion for a preliminary injunction is hereby denied and dismissed. Due to the consequences that will result, a stay of this order is hereby granted and shall expire at 2:00 p.m. on October 28, 1976, to allow plaintiffs sufficient time to file a notice of appeal and apply for further stay of this order, if they are so advised, in the Court of Appeals, Second Circuit, pursuant to Fed. R. App. Pro. 8(a).

It is so Ordered.

Dated: October 21, 1976

Albany, New York


UNITED STATES DISTRICT JUDGE